



STATE OF CONNECTICUT OFFICE OF STATE ETHICS

Draft Advisory Opinion No. 2014-7

October 17, 2014

Question Presented: The petitioner, a former assistant attorney general, asks whether the side-switching ban in General Statutes § 1-84b (a) bars him from representing a private client in a health care fraud matter before the Department of Social Services, in light of what he describes as his “purely administrative and supervisory” involvement “with the preliminary administrative aspects of the matter”

Brief Answer: We conclude, based on the specific facts before us, that the petitioner did not participate “personally and substantially” in the health care fraud matter while in state service and is thus not barred by § 1-84b (a) from representing the private client in the health care fraud matter before the Department of Social Services.

At its October 2014 regular meeting, the Citizen’s Ethics Advisory Board (“Board”) granted the petition for an advisory opinion submitted by Arnold Ira Menchel, Esq., of Halloran & Sage LLP. The Board now issues this advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials¹ (“Ethics Code”).

¹Chapter 10, part I, of the General Statutes.

Facts

The following facts, as set forth by the petitioner, are relevant to this opinion:

During the time period from March 27, 2012 until August 31, 2012, I was employed by the Office of the Attorney General as an assistant attorney general. During this time period, I was the department head of the Health Care Fraud/Health Care Advocacy/Whistleblower Department (“the Department”). As department head, I supervised the work of the Department and all Department staff. The Department Staff included three support staff, three investigators, and twelve assistant attorneys general. Assistant Attorney General Gregory O’Connell was one of the assistant attorneys general working under my supervision during this time.

The way the department was set up, I had three Assistant Attorneys General 4’s (the highest ranking civil service). One was in charge of Health Care Fraud matters, one was in charge of Health Care Advocacy matters, and one was in charge of Whistleblower matters.

Once I assigned a matter, I was not involved further unless it was of high importance, e.g., the first case under the State False Claims Act, on the Health Care Fraud side; a challenge to an increase in insurance rates on the Health Care Advocacy side and sensitive Whistleblower investigations. The other time I would become involved was if there was a problem that was brought to me.

I retired from the Attorney General’s office on August 31, 2012. Since September 10, 2012, I have been the head of the Health Care practice at the law firm of Halloran & Sage.

In late August, 2014 a potential client was referred to me who was the respondent in an administrative Notice of Violation proceeding brought by the Department of

Social Services before a DSS hearing officer. The Notice of Violations (“NOV”) was dated June 11, 2014. The potential client is currently represented, but wished to add a health care attorney to assist him. He became a client. I filed an appearance in addition to his prior attorney, with the hearing officer, with a copy to AAG O’Connell on September 12, 2014. There were some procedural matters pending and the hearing was scheduled to commence on October 6, 2014. Rulings on the procedural matters and the hearing have been stayed pending the issuance of this Advisory Opinion.

I was subsequently contacted by AAG’s O’Connell and Michael Cole raising the following issue.

While I have no recollection of any involvement with the matter, AAG O’Connell indicates that:

On March 27, 2012, a DSS employee contacted AAG O’Connell directly by email to request assistance with drafting a letter to the respondents. The draft letter was for the purpose of addressing alleged actions and omissions by the respondents relative to healthcare provider “A,” who was at the time a former employee of the respondents. AAG O’Connell discussed this request for assistance with the AAG 4 in the Department assigned to Health Care Fraud matters. The AAG 4 and AAG O’Connell agreed that a file should be opened and assigned to AAG O’Connell for the purpose of working on the draft letter.

According to AAG O’Connell, on April 13, 2012, a DSS employee sent a fraud referral to me and other law enforcement agencies concerning the respondents and healthcare provider “A.” This fraud referral was addressed to me and sent by e-mail, including a report and attachments in support of the report. The DSS’s letter addressed to me explained that the information in the fraud referral was being provided so that the Attorney General’s office could perform an independent review of the suspected fraud and pursue whatever civil action it deemed appropriate.

Again, according to AAG O'Connell, on April 16, 2012, I forwarded the DSS's fraud referral by email to the AAG 4 in charge of the Health Care Fraud matters and two investigators, with the message stating: "Here is a new referral. Please review and advise." The AAG 4 who received the fraud referral from me assigned the matter to AAG O'Connell because the related file concerning the draft letter had already been opened and assigned to him.

According to AAG O'Connell, I was sent or copied on seven emails about this matter in April 2012. The emails concerned the assignment of the matter and discussion about whether the DSS should impose a temporary suspension on the respondents and healthcare provider "A." The DSS did not impose the temporary suspension. Employees of an outside law enforcement agency were the originators of two of these emails. The Department staff sent me the other five emails. All seven of the emails were addressed or copied to multiple individuals. In other words, I was not the only person receiving any of these emails. There is no record of me replying to any of these emails.

AAG O'Connell has not found any additional records showing that he discussed this matter with me, nor does he remember discussing this matter with me. However, he says this matter was identified on a case list that was the subject of, in his words, "periodic" meetings between myself and Department staff. This case list was also the subject of "periodic" meetings between me and other OAG supervisors. He has not identified when the matter first appeared on the list nor how many meetings took place in the period between when it was assigned and when I retired.

However, his records indicate, and he remembers, discussing this matter with other Department staff in April 2012. He has checked with other Department staff and neither he nor anyone else remembers discussing this matter with me. The AG's office has not found any other records concerning any participation by me in this matter.

The AG's Office is concerned as to whether based on the facts stated above, I am disqualified pursuant to Conn. Gen. Stat. § 1-84b (a) from assisting in the representation of the respondents on the basis that I participated "personally and substantially" on this matter while in state service. . . .

Analysis

General Statutes § 1-84b (a) is one of the Ethics Code's revolving-door provisions, and it provides, in relevant part, as follows:

No former executive branch . . . state employee shall represent anyone other than the state, concerning any particular matter (1) in which he participated personally and substantially while in state service, and (2) in which the state has a substantial interest.

Designed to prevent "side-switching in the midst of on-going state proceedings,"² § 1-84b (a) attaches to the retiree for life; it applies regardless of the forum (e.g., retiree's former state agency, another state agency, a court); and it applies regardless of whether the retiree is paid to "represent," a term broadly defined "to include any action whatsoever regarding any particular matter"³

As applied here, the ban in § 1-84b (a) is triggered if the following holds true: (1) The petitioner (a former assistant attorney general and, as such, a former executive branch employee) is seeking to "represent" someone other than the state; (2) his representation involves a "particular matter"; (3) he "participated personally and substantially" in the matter while in state service; and (4) the state has a "substantial interest" in the matter.

The first, second, and fourth requirements are easily met here and thus warrant little discussion—particularly given that the petitioner apparently does not disagree. As for the first one, the petitioner seeks to "represent" (i.e., take action on behalf of) someone other than the state, namely, the respondent in the NOV proceeding. As for the second, his representation would involve a "particular matter"—that

²Advisory Opinion No. 89-11, Connecticut Law Journal, Vol. 50, No. 44, p. 5C (May 2, 1989).

³Regs., Conn. State Agencies § 1-81-33.

is, a matter of specific rather than general application⁴—specifically, the health care fraud matter that is now the subject of the NOV proceeding. And as for the fourth, the health care fraud matter is certainly a matter in which the state has a “substantial interest,” as “the finances, health, safety, or welfare of the State or one or more of its citizens will be substantively affected by the outcome.”⁵

That leaves the third requirement and the issue of whether, under § 1-84b (a), the petitioner “participated personally and substantially” in the health care fraud matter while in state service. For purposes of that provision, “substantial participation” means “*participation that was direct, extensive and substantive, not peripheral, clerical or ministerial.*”⁶ According to the petitioner, even if his participation could be deemed “direct,” it was neither “extensive” nor “substantive.” In support, he points, first, to Advisory Opinion No. 95-1 and, then, to case law interpreting substantially similar side-switching bans. We consider both in turn.

In Advisory Opinion No. 95-1,⁷ the State Ethics Commission addressed whether a former state investigator participated “substantially” in a homicide investigation while in state service and was thus barred by § 1-84b (a) from representing the victim’s family as a private investigator in the ongoing investigation. In his state role, he “did no investigation in this case,” but did, in fact,

- view the crime scene,
- attend part of an initial meeting with the state police,
- review several reports, search warrants and arrest warrants,
- attend the probable cause hearing, and
- arrange for witnesses to attend the hearing.⁸

⁴See Advisory Opinion No. 2010-1, Connecticut Law Journal, Vol. 71, No. 34, p. 8C – 10C (February 23, 2010) (addressing the scope of “particular matter” for purposes of § 1-84b (a)).

⁵Regs., Conn. State Agencies § 1-81-15.

⁶(Emphasis added.) Regs., Conn. State Agencies § 1-81-35.

⁷Connecticut Law Journal, Vol. 56, No. 42 (April 18, 1995).

⁸Id.

Even so, the Commission determined that, because he simply “assisted with some of the administrative aspects of the preliminary investigation and probable cause hearing,” his participation did not “rise above the merely ministerial, clerical or peripheral.”⁹ In other words, it was not “substantial,” meaning that § 1-84b (a) did not bar him “from investigating the crime for the victim’s family.”¹⁰

“In contrast,” says the petitioner, “to the many actions taken by [the former state investigator] in 95-1, in this circumstance, apparently I assigned the [health care fraud] matter in April, 2012 and had no subsequent involvement.” And this, he concludes, “makes clear that . . . my involvement was with the preliminary administrative aspects of the matter” and was thus not “substantial” under § 1-84b (a). The distinction, though, is that, unlike the former state investigator, the petitioner served in a supervisory capacity; and the question is whether that distinction is one with a material difference. No advisory opinions address that distinction, so we look to case law that does so in the context of construing substantially similar side-switching provisions, namely, 18 U.S.C. § 207 (a) (1) and Rule 1.11 (a) of the Rules of Professional Conduct.

The first such provision—18 U.S.C. § 207 (a) (1)—houses the side-switching ban in the federal Ethics in Government Act. Under it, former federal government employees may not make certain communications or appearances on another person’s behalf in relation to a “particular matter”

(A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

(B) in which the person *participated personally and substantially* as such officer or employee, and

(C) which involved a specific party or specific parties at the time of such participation¹¹

⁹Id. By way of comparison, the Commission noted that “an investigator working to collect evidence for use by a prosecutor at trial is performing work of a substantial nature.” Id.

¹⁰Id.

¹¹(Emphasis added.) 18 U.S.C. § 207 (a) (1).

As to what is meant by “substantially,” the federal regulations explain:

To participate “substantially” means that the employee’s involvement is of significance to the matter. Participation may be substantial even though it is not determinative of the outcome of a particular matter. *However, it requires more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue.* A finding of substantiality should be based not only on the effort devoted to a matter, but also on the importance of the effort. While a series of peripheral involvements may be insubstantial, the single act of approving or participating in a critical step may be substantial. . . . *Participation in peripheral aspects of a matter or in aspects not directly involving the substantive merits of a matter . . . is not substantial.*¹²

In terms of case law, there is, as one court put it, “but scant authority on the scope of ‘substantial’ participation under § 207 (a) (1)”¹³—and this is especially true as it relates to persons serving in a supervisory capacity. Nevertheless, there are two federal court decisions of particular relevance—*United States v. Martin*¹⁴ and *United States v. Clark*¹⁵—and they suggest that the petitioner’s involvement in the health care fraud matter was with what the federal regulations call the “peripheral aspects” or “aspects not directly involving the substantive merits of a matter”

The courts in *Martin* and *Clark* concluded, respectively, that § 207 (a) (1) barred a former Assistant United States Attorney (“AUSA”) from representing a criminal defendant at trial because the AUSA participated “substantially” in the case while in office.¹⁶ In *Martin*, the court found “substantial” participation on the grounds that the former AUSA, who had supervisory authority over the case,

¹²(Emphasis added.) 5 C.F.R. § 2641.201 (i) (3).

¹³*United States v. Rosen*, 599 F. Supp. 2d. 690, 701 (E.D. Va. 2009).

¹⁴39 F. Supp. 2d. 1333 (D. Utah 1999).

¹⁵333 F. Supp. 2d. 789 (E.D. Wis. 2004).

¹⁶*United States v. Martin*, supra, 39 F. Supp. 2d. 1334-35; *United States v. Clark*, supra, 333 F. Supp. 2d 791.

- authorized investigative activities by the FBI,
- authorized the use of a polygraph on the investigation's target,
- was in a position to render prosecutive opinions in the matter,
- required interviews of the investigation's target,
- requested investigation into other aspects of the case,
- issued at least one grand jury subpoena for records, and
- participated in strategy meetings concerning the case.¹⁷

And in *Clark*, the court found “substantial” participation on the grounds that the former AUSA

- was the assigned AUSA when the matter was opened,
- received investigative reports from, and discussed the matter with, the lead law enforcement agent,
- participated in at least one debriefing,
- likely assisted in obtaining hotel records and subpoenas,
- assigned the matter to another AUSA under his supervision, and
- approved the subordinate AUSA's prosecution memo, without which the case could not have gone forward.¹⁸

Here, in stark contrast to *Martin* and *Clark*, the petitioner took a single affirmative step after receiving the DSS fraud referral: he forwarded it to the AAG 4 in charge of health care fraud matters and to two investigators, asking them to “review and advise.” Aside from that, no one at the Department—including AAG O’Connell, who was assigned to work on the matter—recalls ever discussing the matter with him (nor he with them), despite that it was placed on a case list that was the subject of “periodic meetings.” (AAG O’Connell does,

¹⁷*United States v. Martin*, supra, 1334-35.

¹⁸*United States v. Clark*, supra, 794-95.

however, recall discussing the matter with *others* in the Department during the petitioner's remaining five months in office.) Further, although the petitioner (and multiple others) was sent or copied on seven e-mails concerning the matter, he does not recall, nor is there any record of him, responding to a single one. Given these facts, the petitioner's involvement in the matter was not (as it was in *Martin* and *Clark*) "substantial," but rather what the federal regulations label "perfunctory . . . or . . . on an administrative or peripheral issue."¹⁹

Bolstering our conclusion is case law construing the second side-switching provision mentioned above, Rule 1.11 (a) of the Rules of Professional Conduct, the gist of which is this: "where an attorney moves from the public sector to private employment, he or she is disqualified from representing a litigant in a matter in which the attorney '*participated personally and substantially*' as a government employee."²⁰ Two cases in particular—one finding "substantial" participation (*In re White*²¹) and one not (*In re Coleman*²²)—bear on the issue at hand.

In re White involved whether a former head of the investigating unit at the D.C. Office of Human Rights ("OHR") violated Rule 1.11 (a) of the D.C. Rules of Professional Conduct by representing Ms. Gladys Thomas in an age-discrimination lawsuit.²³ As unit head, she "supervised the investigation of [Ms. Thomas's] age discrimination complaint," and was given "a draft Letter of Determination ('LOD') concerning Ms. Thomas's complaint," which concluded that there was no probable cause to support it.²⁴ She argued that, "even if she had titular supervisory responsibility" for the matter at OHR, "she did not, in fact, have personal, substantial, material input into" it.²⁵ The court disagreed, noting that she

reviewed and commented on the LOD before its issuance . . . was given the draft and in fact reviewed it . . . had access to, reviewed, and was aware of, the

¹⁹5 C.F.R. § 2641.201 (i) (3).

²⁰(Emphasis added.) *In re Coleman*, 69 App. Div. 3d 846 (2010).

²¹*In re White*, 11 A.3d 1226 (D.C. 2011).

²²*In re Coleman*, supra, 846.

²³*In re White*, supra, 11 A.3d 1229.

²⁴*Id.*

²⁵*Id.*, 1246.

contents of the G. Thomas file after the issuance of the LOD and communicated directly with G. Thomas regarding ‘reconsideration’ of the LOD decision²⁶

The court concluded therefore that the former unit head was substantially “involved in dealing with the G. Thomas OHR file after issuance of the LOD *and not simply in a pro forma capacity as supervisor*”²⁷

In *In re Coleman*, a New York court addressed whether, under Rule 1.11 (a) of the N.Y. Rules of Professional Conduct, the former chief court attorney of a trial court’s law department participated “substantially” in a particular proceeding while in office, given the following: the proceeding was referred to the law department during his tenure there, and he “would have been required to review every proceeding referred to the Law Department in order to assign it to a subordinate court attorney.”²⁸ The court’s response (which is lengthy but worth quoting in full given the case’s factual similarity to the situation before us) was this:

[He] did not ‘participate personally and substantially’ in every case referred to the Law Department while he served as chief court attorney simply because his stated duties allegedly required him to review every case referred to the Law Department in order to assign it to an appropriate subordinate court attorney. Rather, even if [his] position entailed such review . . . this responsibility was administrative rather than substantive in nature, did not directly affect the merits of any such case, and did not rise to the level of personal and substantial participation necessary to warrant [his] disqualification from appearing as counsel in every such case now that he has left his employment with the court²⁹

The same holds true here. Even if the petitioner reviewed the DSS fraud referral in order to assign it (in the normal course) to the appropriate subordinate AAG, this responsibility, in and of itself, was

²⁶Id.

²⁷(Emphasis added.) Id.

²⁸*In re Coleman*, supra, 69 App. Div. 3d 848.

²⁹Id., 849-50.

administrative, did not affect the merits of the matter, and was thus not “substantial.” In other words, he was, to borrow language from *In re White*, acting “simply in a pro forma capacity as supervisor.”³⁰ Although there may be matters that were referred to him during his tenure as department head “in which his involvement went beyond administrative review,” there is nothing before us to suggest that his “involvement, if any, in the instant proceeding was more than administrative.”³¹

Conclusion

Based on the foregoing, we conclude that the petitioner did not participate “personally and substantially” in the health care fraud matter while in state service and is thus not barred by § 1-84b (a) from representing the private client in the health care fraud matter before the Department of Social Services.

By order of the Board,

Dated _____

Chairperson

³⁰*In re White*, supra, 11 A.3d 1246.

³¹*In re Coleman*, supra, 69 App. Div. 3d 848-49.